No. 15-493

In The

Supreme Court of the United States

MELENE JAMES,

Petitioner,

v.

CITY OF BOISE, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, STEVEN BONAS, STEVEN BUTLER, AND TIM KUKLA,

Respondents.

On Petition For A Writ Of Certiorari To The Idaho Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SCOTT B. MUIR
Counsel of Record
Deputy City Attorney
BOISE CITY ATTORNEY'S OFFICE
150 N. Capitol Blvd.
P.O. Box 500
Boise, ID 83701-0500
(208) 384-3870
smuir@cityofboise.org

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

COUNTERSTATEMENT OF QUESTION PRESENTED

Both 42 U.S.C. § 1988 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), authorize a court, "in its discretion," to award reasonable attorney's fees in specified proceedings. This Court interpreted those provisions, respectively, in *Hughes v. Rowe*, 449 U.S. 5 (1980), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 413 (1978), to allow awards of attorney's fees against a plaintiff only if the plaintiff's lawsuit is "frivolous, unreasonable, or without foundation."

The question presented is whether the Idaho Supreme Court abused its discretion in awarding attorney's fees to the successful defendants in a 42 U.S.C. § 1983 action given the standard of "frivolous, unreasonable, or without foundation" set forth by this Court in *Hughes v. Rowe*, 449 U.S. 5 (1980), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 413 (1978).

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STATEMENT

Respondents were awarded attorney's fees on appeal by the Idaho Supreme Court pursuant to 42 U.S.C. § 1988 which provides, in pertinent part, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Idaho Supreme Court acknowledged that in an action under 42 U.S.C. § 1983, this Court has held that awards of attorney's fees will be allowed against a plaintiff only if the plaintiff's lawsuit is "frivolous, unreasonable, or without foundation." *Hughes v. Rowe*, 449 U.S. 5 (1980), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 413 (1978). The Idaho Supreme Court went on to state *sua sponte* in its decision,

> Although the Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute. Therefore, in cases filed in the Idaho state courts seeking to recover under 42 U.S.C. § 1988, the court has discretion in deciding to award attorney fees to the prevailing party, whether the prevailing party is the plaintiff or the defendant.

Pet'r's App. at 55. If the sole question presented on the petition for a writ of certiorari is, as framed by Petitioner, "whether the Idaho Supreme Court correctly concluded that *Hughes* and *Christiansburg* do not bind state courts because this Court 'does not

have authority to limit the discretion of state courts where such limitation is not contained in the statute,'" the inquiry can end here and summary disposition may be appropriate. Respondents are unable to locate any authority or case law to support that assertion of the Idaho Supreme Court. But the Idaho Supreme Court went further in its findings supporting an award of attorney's fees pursuant to 42 U.S.C. § 1988 by stating:

> In this case, we will award attorney fees against the Plaintiff on her claim based upon 42 U.S.C. § 1988. It was clear that her claim would be barred by qualified immunity under the clearly established law of the ninth circuit, and the Plaintiff did not cite any law to the contrary.

Pet'r's App. at 55-56.

Respondents argue that the Idaho Supreme Court was actually exercising its discretion in awarding attorney's fees on appeal pursuant to 42 U.S.C. § 1988 under the "frivolous, unreasonable, or without foundation" standard enunciated in *Hughes* and *Christiansburg Garment Co.*, *supra*, as supported by the above quoted finding.

REASONS FOR DENYING THE PETITION

I. The Idaho Supreme Court applied the "frivolous, unreasonable, or without foundation" standard of *Hughes* and *Christiansburg Garment Co.*

On appeal to the Idaho Supreme Court, Respondents sought an award of attorney's fees and costs pursuant to 42 U.S.C. § 1988, and Idaho Code §§ 12-117 and 12-121. It was acknowledged in Respondents' Brief on appeal that for the court to award attorney's fees pursuant to 42 U.S.C. § 1988, it must find that defendants are the prevailing parties and that the plaintiff's appeal is "frivolous, unreasonable, or without foundation," as set forth in *Hughes v. Rowe*, 449 U.S. 5 (1980), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 413 (1978). Cited in the Respondents' Brief was *Santiago v. Municipality of Adjuntas*, 741 F.Supp.2d 364 (D.P.R. 2010), *vacated and remanded sub nom. Torres-Santiago v. Municipality of Adjuntas*, 693 F.3d 230 (1st Cir. 2012), which stated that for an award of attorney's fees to defendants, the court must determine that the defendants are the prevailing party and plaintiff's suit was "totally unfounded, frivolous or otherwise unreasonable." *Id.* at 370. Pet'r's App. at 54-56. Despite the Idaho Supreme Court's holding to the contrary, state courts are bound by this Court's interpretation of a federal statute. *See, Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012).

Here, the Idaho Supreme Court distinguished between an award of attorney's fees for state law

claims and an award of attorney's fees for § 1983 civil rights claims. As to state law claims, Respondents sought attorney's fees pursuant to Idaho Code §§ 12-117 and 12-121. The Idaho Supreme Court did not award attorney's fees on any of Petitioner's state law claims.

Idaho Code § 12-117 requires that "in any . . . civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, . . . the court . . . shall award the prevailing party reasonable attorney's fees . . . if it finds that the nonprevailing party acted without a reasonable basis in fact or law." The court found that the appeal in regard to Petitioner's state law claims was not brought without a reasonable basis in fact or law, and hence, did not award attorney's fees pursuant to this statute. Pet'r's App. at 56.

As to the claim of attorney's fees pursuant to Idaho Code § 12-121, the Idaho Supreme Court held that under this statute the court must find that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation. "Because the appeal regarding the Plaintiff's claims under state law was not brought or pursued frivolously, unreasonably, or without foundation, we will not award attorney's fees under that statute." Pet'r's App. at 56. The Idaho Supreme Court found that, even though Respondents were the prevailing parties, Respondents were not entitled to an award of attorney's fees on appeal of the state law claims. Pet'r's App. at 56.

As to attorney's fees pursuant to 42 U.S.C. § 1988, the Idaho Supreme Court made findings that support an award of attorney's fees under the *Hughes* and *Christiansburg Garment* standard of frivolous, unreasonable, or without foundation. It stated, "In this case, we will award attorney fees against the Plaintiff on her claim based upon 42 U.S.C. section 1988. It was clear that her claim would be barred by qualified immunity under the clearly established law of the ninth circuit, and the Plaintiff did not cite any law to the contrary." Pet'r's App. at 55-56.

The Idaho Supreme Court was fully aware of the standard to award attorney's fees to prevailing defendants on appeal pursuant to 42 U.S.C. § 1988 as it had previously addressed that very issue twice and correctly applied that federal statute as interpreted by this Court in *Hughes*, *infra* and *Christiansburg Garment Co.*, *infra*. In a prior case, the Idaho Supreme Court declined to award attorney's fees to the prevailing defendants on appeal pursuant to 42 U.S.C. § 1988. *Karr v. Bermeosolo*, 142 Idaho 444, 449, 129 P.3d 88, 93 (2005). In *Karr*, a former employee of the state veterans home filed suit against the state and her supervisors alleging violations of her constitutional rights to due process and free speech. The Idaho Supreme Court, citing to *Legal Servs. of N. California v. Arnett*, 114 F.3d 135, 141 (9th Cir. 1997), held that a prevailing defendant is only entitled to attorney's fees under 42 U.S.C. § 1988 where the plaintiff's action is "unreasonable, frivolous, meritless, or vexatious" and did not award attorney's

fees. The Idaho Supreme Court again applied that same standard in declining to award attorney's fees to prevailing defendants under 42 U.S.C. § 1988 in *Nation v. State, Dept. of Correction*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007).

While the Idaho Supreme Court was incorrect in stating that *Hughes* and *Christiansburg Garment Co.* do not bind state courts, it nonetheless applied the correct standard to the Petitioner's appeal, and awarded attorney's fees to Respondents based on a finding that Petitioner's appeal was "frivolous, unreasonable, or without foundation."

II. Support for a finding of frivolous, unreasonable, or without foundation.

A. Statement of underlying case.

Respondents adopt the facts of the case as set forth by the Idaho Supreme Court as follows:

> On Sunday, December 26, 2010, at about 5:22 p.m., a citizen made a 911 telephone call to report a breaking and entering at a dental office in Boise. The citizen told the operator that he was at his family's house and heard glass breaking at the dental office across the street. When he went to investigate, he saw a woman about halfway through a window. He stated: "I talked to the lady, and she's trying to get her keys out of the building. She looks like she's, uh, under the influence of either drugs or major alcohol or something." When asked how the woman broke in, the

citizen stated that he heard breaking glass, he was across the street, and she was halfway through the glass. He then said, "She's really lethargic, and I think she's probably under the influence of some alc-er, uh, some drugs." Later in the conversation, he said: "I asked her if she's okay, and she kinda looked at me kinda crazy, and she's not like really anger [sic] or anything, but she's like totally out of it. She's saying she's trying to get her keys out of there." The operator asked if the woman was still in the building, and the citizen answered: "I believe so, yes. She's kind of in the down basement part, and if she was to come back out, I would be able to see her." At about 5:25 p.m., Boise police officers were dispatched to the location of the dental office.

The first to arrive was Officer Butler, who arrived at the scene at about 5:30 p.m. The building was a single story office building with a basement. The basement had windows to the outside and long window wells, each of which served multiple basement windows. There were wrought iron railings to keep people from falling into the window wells.

Officer Butler met with the citizen, who was standing on the north side of the building. He reported that he had seen a woman break the window and enter the building and that he believed she was still in the downstairs part of the building. The officer walked to the northeast corner of the building to a point

where he could see that a north-facing basement window had been broken out. He then relayed that information to the other responding officers.

As Officer Butler was looking for suspects, he saw a woman through an east-facing basement window at the northeast corner of the building. She was standing with her right side toward the window, and she had a large can of a malt liquor beverage in her left hand and what appeared to be a knife with a 4-5 inch blade in her right hand. She appeared to be rummaging through things on a workbench or table. He observed her briefly, and she then walked out of view. The entire building was dark except the room in which he had seen her standing.

Officer Barber and Sergeant Kukla arrived a few minutes after Officer Butler. Officer Butler told them what he had seen, that the suspect was still in the building, and that she was armed with some kind of an edged weapon. After additional officers arrived, they established a perimeter around the building.

Officer Barber telephoned one of the dentists who owned the building. The dentist came to the scene, and Officer Barber heard him state that no one should be in the building, especially no one who entered by breaking a window. The cleaning lady also came to the scene, and she told Officer Barber that a woman worked in the building. When she

began to describe the woman, the dentist reiterated that anyone who had to break into the building was not supposed to be there, so the conversation ended.

At about 5:40 p.m., Sergeant Kukla requested a patrol canine. Officer Bonas, a police officer who was a canine handler, was told of that request when he came on duty at 6:00 p.m. He was informed that there was a request for a patrol canine for a burglary in progress at a dental office. He arrived at the dental office at about 6:10 p.m. and spoke with Officers Barber and Butler and Sergeant Kukla. Lieutenant Schoenborn was also there. Officer Bonas was informed that a witness had seen a woman force entry into the dental office by shattering a downstairs window. Officer Butler stated that he had seen the woman through a window and that she was armed with a knife. Sergeant Kukla and Officer Barber stated that the owner of the business was there and informed them that no one should be inside the building. Officer Bonas went to the northeast corner of the building and saw the broken window. He also observed that the entire upstairs and the majority of the downstairs were dark. He then decided that the use of a police dog was reasonable and necessary and the safest way to search for the suspect in the building.

Officer Bonas made the initial decision to use a police dog to find the suspect or suspects in the building. The factors he considered were: that the crime involved was burglary, a

felony; burglaries at other local dental offices had occurred that month; one suspect had been seen armed with a knife; dental offices contain nontraditional weapons; the suspect(s) would have the tactical advantage of concealment and could be lying in wait in the dark; Officer Butler had used the public address system in a police car to announce to the suspect inside the building that they were police officers, that if the suspect did not surrender they would use a police dog, and that they may be bitten; and that using a police dog would be safer than having officers search the building, because the officers would have their guns drawn, increasing the danger to all parties involved. Lieutenant Schoenborn, as watch commander, discussed the use of the dog with Sergeant Kukla, and then authorized Officer Bonas to deploy the dog.

Officer Bonas then took the dog out of his car and proceeded to the front door of the building, accompanied by Sergeant Kukla and Officers Barber, Rapp, Butler, and Harr. Officer Barber unlocked the door using a key that had been obtained from either the dentist or the cleaning lady. Officer Bonas announced in a loud voice through the open door: "Suspect in the building. Boise Police canine calling out. Surrender. If you do not surrender – [barking]. Heel. If you do not surrender a police dog will be sent. When he finds you, he will bite you. This is your final warning [barking]." There was no response from inside the building, so the officers entered and

began searching the ground floor. After about two minutes, they stopped near the top of the stairs going to the basement. Officer Bonas then made a second announcement, stating in a loud voice: "Attention in the building. Boise Police canine calling out. Surrender. If you do not surrender, a police dog will be sent, and when he finds you he will bite you. This is your final warning." There was no response.

They then continued searching the ground floor part of the building, which took about six minutes. They again stopped at the top of the stairs going to the basement. Officer Bonas made a third announcement, stating in a loud voice: "Suspect downstairs. Boise Police canine calling out. Surrender. If you do not surrender, a police dog will be sent. When he finds you, he will bite you. This is your final warning." There was no response.

Officer Bonas then decided to send the police dog down the stairs into the basement. He could tell that there was a light on downstairs and that the sides of the stairs were walled, not open, so there was a blind corner at the bottom of the stairs. He released the dog from his leash, and the dog went down the stairs. The officers remained at the top of the stairs. After a while, the dog began barking, indicating that he smelled the odor of a human. Because the human odor could be carried by air movement up a wall, across the ceiling, and down on the other side of a room, locating the odor would not mean that

the person was located. Officer Bonas then gave the dog a command to bite, which would cause the dog to use his eyes and ears to find a person. After a few seconds, Officer Bonas heard a female screaming from the basement.

He headed down the stairs with the other officers following him. At the bottom of the stairs he turned to the left and saw a bathroom door that was open about seven or eight inches. The screams were coming from the bathroom, and he could see a human torso and the police dog inside the bathroom. The bathroom door then closed. Officer Rapp, who had a shield that he could use for protection, pushed the door open. The interior of the bathroom was dark without any light on, but Officer Bonas could see that the police dog was biting the woman's right arm. She was lying on the floor. He yelled at her to show her hands, but she did not comply. He then commanded the dog to release and lie down, and he did. Once the dog released, Officer Bonas left the bathroom and moved with the dog to a hallway where he could cover the other officers.

Officer Harr, a female officer, was behind Officer Bonas when the bathroom door was opened. She saw a female lying on the floor. Her pants were pulled down past her knees, and she was wearing a T-shirt. Officer Harr helped pull the woman's pants up. She described the woman as being "completely out of it. Intoxicated." She stated that the

woman "was completely lethargic, just slumped over, like completely out of it." After the woman was removed from the bathroom, Officer Harr, Officer Bonas, and other officers continued searching the remainder of the basement, but found no other suspects. The woman was taken first to paramedics who were posted nearby and then to the hospital. Testing at the hospital revealed that she had a blood alcohol content of 0.27. The woman was later identified as Melene James, the Plaintiff.

The basement of the building had been leased to a man who operated a dental laboratory making crown bridges. Beginning on January 1, 2010, the Plaintiff began using a small corner of the lab pursuant to an oral agreement with the man that she would help him as needed in exchange for him permitting her to use the laboratory to make orthodontic appliances in her own business. The Plaintiff lived in an apartment located about one-half block from the dental building. At about 4:00 p.m. on December 26, 2010, a neighbor had called her, told her that a tooth had fallen out of his denture and that he had an important meeting the next day, and asked if she could repair the denture that day. She agreed to do so. He gave her the denture, and she walked to the dental building to make the repairs. There was a cement stairway outside the building providing access to the basement. She had a key to the door, and she walked down those stairs, unlocked the door, and entered the basement. It

took her about 20 to 30 minutes to make the repairs, but she then had to let the acrylic cure for about 30 minutes. While it was curing, she walked out the basement door to have a cigarette. Once she was ready to return to her work, she realized that the door had locked behind her and her keys and cell phone were inside the building. There was a basement window that was sometimes left unlocked, so she walked up the stairs to where that window was and climbed over the wrought-iron railing and down into the window well. As she was trying to open the window, she accidently broke it. She had equipment running that could be a fire hazard, and so she decided to crawl through the broken window. While she was doing so, the citizen approached and asked if she needed any help. Once inside the building, she did not telephone the man who was permitting her to use the basement because she was afraid he would become upset and not allow her to use the laboratory any more. She opened the refrigerator to get some water and saw the can of malt liquor. She decided to drink it in order to calm down before calling him. She also did not attempt to contact either of the dentists who owned the building. She began doing the work to finish repairing the dentures, and then went to the bathroom. She closed the door, but may not have latched it. That is the last thing she remembers. She did not hear the officers, the announcements to surrender or she would be

bitten by a dog, or the dog barking in the basement just before it bit her.

On October 4, 2012, the Plaintiff filed this action against Officers Bonas and Butler, and Sergeants Kukla and Likes (herein "the Police") and City of Boise. Sergeant Likes had not been at the scene and had no involvement in what occurred, but he was the patrol supervisor for the four patrol dogs. The Plaintiff alleged that the Defendants violated the Idaho Tort Claims Act by committing the torts of assault, battery, false arrest, wrongful imprisonment, and intentional infliction of emotional distress and by negligently failing to train, supervise, and control the police dog, allowing him to repeatedly bite Plaintiff. She also alleged a claim under 42 U.S.C. § 1983, asserting that the Defendants violated her rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States by entering and searching the laboratory where she worked, by seizing her, and by using excessive force in arresting her.

The Defendants moved for summary judgment, and, after the motion was briefed and argued, the district court issued a memorandum decision and order granting the motion. It held that the Defendants were entitled to qualified immunity with respect to the federal claims; that pursuant to Idaho Code section 6-904 they were not liable under the Idaho Tort Claims Act for the alleged intentional torts; and that the Plaintiff had failed

> to present evidence showing a negligent failure to train, supervise, or control the police dog. The court entered a judgment dismissing all of the Plaintiff's claims with prejudice. She filed a motion for reconsideration and later a notice of appeal. After briefing and argument on the motion, the court entered an order denying the motion for reconsideration.

James v. City of Boise, 158 Idaho 713, 351 P.3d 1171, 1173-77 (2015), reh'g denied (June 19, 2015), reh'g denied (July 20, 2015) (internal footnotes omitted); Pet'r's App. at 2-12.

The Idaho Supreme Court affirmed the judgment of the Idaho district court and awarded Respondents attorney's fees in the claim under 42 U.S.C. § 1983. Pet'r's App. at 57.

B. 42 U.S.C. § 1983 claims

1. *Monell* claims against Respondent City of Boise.

Respondents argued at the summary judgment hearing that Petitioner had not alleged a *Monell* claim against the City of Boise. Pet'r's App. at 35. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), established that a municipality is a "person" that can be sued under § 1983, but "will not be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. Without deciding whether Petitioner had adequately

alleged a *Monell* claim against the City of Boise, the district court disposed of any such claim since it did not find any constitutional violation by the officers. Pet'r's App. at 113. In the appellate decision, the Idaho Supreme Court stated: "The Plaintiff does not contend that her complaint alleges a *Monell* claim against the city, nor does she point to any such alleged claim in her complaint. 'We will not consider assignments of error not supported by argument and authority in the opening brief.' *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006). Therefore, we will not consider this issue." Pet'r's App. at 37.

Because Petitioner failed to allege a *Monell* claim against the City of Boise, the only 42 U.S.C. § 1983 claims considered on appeal were excessive force claims against the individual defendants.

2. Excessive force claims against the individual Respondents.

The Idaho district court granted summary judgment to the individual Respondents based on a finding of qualified immunity and stating, "there was no clearly established law proscribing the use of police dogs under circumstances presented to the officers here." Pet'r's App. at 118. Both the Idaho district court and the Idaho Supreme Court found that the Petitioner's allegations were too general and did not properly define the clearly established right that was purportedly violated. Petitioner contended "[t]he

clearly established right at issue here is a citizen's right 'to be free from excessive use of force under the facts and circumstances presented in this case.'" Pet'r's App. at 14. The Idaho district court asserted "the inquiry should be whether a reasonable police officer would have known as of December of 2010 that it was unlawful to utilize a police dog to search for and bite and seize a hidden and potentially armed suspect during a burglary in progress." Pet'r's App. at 15. The Idaho Supreme Court further clarified the issue, explaining: "[t]he issue in this case is the use of a police dog to find and subdue by biting a suspected burglar in a dark basement after the suspect failed to respond to police announcements stating to surrender or a police dog would be sent that would find and bite him or her. The clearly defined law has to focus upon the use of the police dog under the circumstances of this case." Pet'r's App. at 19.

In its decision, the Idaho Supreme Court focuses on three Ninth Circuit decisions: *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994); *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998); and *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003), to set forth the clearly defined law. Pet'r's App. at 15-18. *Chew* involved a traffic stop from which the suspect fled on foot into a scrapyard. It was discovered that the suspect had three outstanding warrants for his arrest so backup officers were called to assist. The police set up a perimeter and canine units and a helicopter were called in for the search. A canine was sent into the scrapyard and approximately two hours after he

fled into the scrapyard, the dog located and bit the suspect. There was a factual dispute as to whether the suspect tried to surrender prior to being bitten. The Ninth Circuit held that the defendants were entitled to qualified immunity with respect to the policy authorizing "the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing them." 27 F.3d at 1446. The use of police dogs to search for and apprehend fleeing or concealed suspects was not new or unique when this incident occurred on September 4, 1988. The *Chew* court cited *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), as the only reported case at the time of the incident that had considered the constitutionality of such a canine policy, and found it constitutional. *Id.* at 1447.

In *Watkins*, officers responded to a silent alarm at a commercial building on November 20, 1993. The officers announced twice that they had a dog that would be released in the building, and it would find and bite the suspect. The Ninth Circuit cited to its prior holding in *Chew* that a "bite and hold" policy did not violate clearly established law on the use of excessive force. There was no change in the law that would have alerted the officer that his use of a police dog to search and bite was unconstitutional. *Id.* at 1092.

Lastly, *Miller* involved an incident in which the suspect fled into a dense forested area across from his parents' house at night. The suspect was wanted for the felony of fleeing from police by driving a car with

a wanton or willful disregard of the lives of others. Upon arriving at the wooded area, Deputy Bylsma yelled a warning that if the suspect did not make himself known, a police dog would be sent to find him. The dog was directed to search and detain the suspect by biting him. The deputies followed the dog and arrived less than a minute after the dog found and bit the suspect. Miller sustained serious injuries, but the Ninth Circuit found this to be a reasonable seizure and not a use of excessive force in violation of his Fourth Amendment rights. *Id.* at 968.

The Idaho Supreme Court found that these three Ninth Circuit decisions established clear controlling authority as to whether it constitutes excessive force to use a police dog to bite, hold and seize a suspect. "The Plaintiff has not cited any authority to the contrary [of the three Ninth Circuit cases], and the decisions of the ninth circuit on this issue are the controlling authority unless the Supreme Court decides otherwise. It is not sufficient merely to say that the use of a police dog to bite and hold a suspect constitutes excessive force, because there is no clearly established controlling authority so holding." Pet'r's App. at 20.

Later in the opinion, the Idaho Supreme Court made a more fact-specific declaration that "the relevant issue is whether there was clearly established law that would have prohibited Officer Bonas from commanding the dog to find and bite the suspected burglar in the dark basement who had failed to respond to the calls to surrender. The Plaintiff does

not cite any authority so holding." Pet'r's App. at 26-27.

The Idaho Supreme Court ultimately concluded its qualified immunity analysis as follows:

> In light of the Ninth Circuit decisions of *Chew, Watkins*, and *Miller*, it cannot be concluded that every reasonable official would have understood beyond debate that the conduct of the Police in this case violated a clearly established right of the Plaintiff. The Plaintiff has not cited a single case holding that the use of a police dog to find and subdue by biting a suspected burglar in a building constitutes excessive force. Absent a decision on the issue from this Court or the United States Supreme Court, the clearly established law is that of the Ninth Circuit, which holds that it does not.

Pet'r's App. at 34.

This finding was reiterated in the award of attorney's fees on appeal. "In this case, we will award attorney fees against the Plaintiff on her claim based upon 42 U.S.C. section 1988. It was clear that her claim would be barred by qualified immunity under the clearly established law of the ninth circuit, and the Plaintiff did not cite any law to the contrary." Pet'r's App. at 55-56.

The Idaho Supreme Court's analysis of the relevant case law and its conclusion that it was "clear" that Petitioner's claims were barred under "clearly

established law," leads to the inescapable conclusion that the appeal was, in fact, brought frivolously, unreasonably, and without foundation.

CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Court to deny the Petition. In the alternative, Respondents ask this Court to remand the case to the Idaho Supreme Court for that court to apply the "frivolous, unreasonable and without foundation" attorneys fee standard.

Respectfully submitted,

SCOTT B. MUIR
Counsel of Record
Deputy City Attorney
BOISE CITY ATTORNEY'S OFFICE
150 N. Capitol Blvd.
P.O. Box 500
Boise, ID 83701-0500
(208) 384-3870
smuir@cityofboise.org